defendants did not use such interest as pretexts to justify the franchising process.

Finally the jury said that defendants' franchising process does *not* result in "better" cable television service (in terms of the system's technology, capabilities and channel capacity) than would be achieved without the franchising process. The jury was unable to agree on whether defendants used "better cable television service" as a pretext to justify their franchising process.

The jury was also unable to agree on whether the predominant purpose of defendants' franchising process was to suppress speech. They disagreed on whether the predominant purpose was to limit the ability of cable operators to express their views and exercise their editorial judgment. The jury was also divided on whether defendants denied plaintiff permission to construct and operate a cable television system because defendants oppose plaintiff's views. Also unanswered are the special verdicts on whether the franchising process applies evenhandedly, regardless of viewpoint, and whether defendants' purpose was to advance the expression of one viewpoint and discourage the expression of another.

769 F.2d 195, 198 (4th Cir.1985) (court has duty to harmonize answers if fairly possible). Finally, a special verdict must, of course, be construed in light of surrounding circumstances. *R.H. Baker*, 331 F.2d at 509.

III. FINDINGS AND CONCLUSIONS BY THE COURT

A. *Mootness as a Result of Change in Cable Policy*

The threshold question the court must address concerns an issue which arose after the jury returned its special verdicts. Defendants enacted ordinances which opened up the cable market to competition. These ordinances impose certain requirements [5] on would-be cable operators but otherwise abandon the single franchise policy. Defendants observe that plaintiff is only challenging defendants' determination that there should be a single provider of cable television services in Sacramento. Because this is no longer defendants' policy, defendants argue that plaintiff's request for injunctive and declaratory relief is moot.

[2, 3] A case, or a question in a case, is considered moot if it has lost its character

issues in a case, no justiciable controversy is presented. *Id.* (citing *Flast v. Cohen*, 392 U.S. 83, 95, 88 S.Ct. 1942, 1950, 20 L.Ed.2d 947 (1968)).

In *Armster v. United States District Court*, 806 F.2d 1347 (9th Cir.1986), the Ninth Circuit indicated that the ultimate question is the likelihood of recurrence of the challenged activity. *Id.* at 1358. When there is a reasonable possibility that the unlawful conduct will recur, the mere cessation of that conduct will not render the challenged conduct immune from judicial scrutiny. *Id.* at 1358–59. There is a "powerful presumption favoring adjudication" under such circumstances. *Id.* at 1359 (quoting Fallon, *Of Justiciability, Reme-*

defendants from issuing any licenses under the new ordinances.

[4] This court cannot, at this early stage, express any views on the merits of these attacks on the new ordinances. The attacks nonetheless create the possibility that any licenses issued under the ordinances will ultimately be invalidated. If this occurs, plaintiff in the instant case will not receive the relief it sought in initiating this lawsuit: the right to enter the Sacramento cable television market.

In short, this court can only resolve one lawsuit at a time. The law on cable television franchising/licensing is too uncertain for this court to even begin to predict the outcome of this second suit. Consequently,

may not be imposed on one engaging in the cable television business.

1. Plaintiff's Speech is Protected by the First Amendment

[5] As a threshold matter, the court notes that both the Supreme Court and Ninth Circuit have determined that cable television system operators are entitled to some degree of first amendment protection. *Preferred*, 754 F.2d at 1403 (it is clear "some" first amendment protection exists), *aff'd on narrower grounds*, 106 S.Ct. at 2037 (proposed activities "seem to implicate" first amendment interests); *see also Pacific West*, 798 F.2d at 355 ("Pacific West's proposed cable broadcasting activities undoubtedly implicate first amendment interests ...").

The jury found in this case that plaintiff has the technical and financial capabilities to construct and operate a cable television system, and hence is a first amendment speaker. As such, plaintiff's exclusion from the cable television market creates a first amendment issue.

2. Standard to be Applied

Of course, to say that defendants' franchising process presents a first amendment *issue* is not to say that it constitutes a first amendment *violation*. *See Vincent*, 466 U.S. at 803–05, 104 S.Ct. at 2127–28 (quoting *Metromedia, Inc. v. San Diego*, 453 U.S. 490, 561, 101 S.Ct. 2882, 2920, 69 L.Ed.2d 800 (1981) (Burger, C.J., dissenting)). The mere fact that a regulation imposes a limitation on constitutionally protected speech does not mean the regulation is invalid; the question is whether the regulation represents a constitutionally permissible restriction on speech. *See Consolidated Edison Co. of New York, Inc. v. Public Service Commission of New York*, 447 U.S. 530, 535, 100 S.Ct. 2326, 2332, 65 L.Ed.2d 319 (1980).

[6, 7] Defendants argue that this determination cannot be made at this point because the jury was unable to agree on any of the special verdicts dealing with "content-neutrality" of defendants' policy. Regulations adopted with a purpose to suppress first amendment rights are presumptively invalid; however, this presumption only applies if suppression of speech is a predominant purpose in enacting the regulation. *Walnut Properties, Inc. v. City of Whittier*, 808 F.2d 1331, 1334–35 (9th Cir. 1986) (citing *City of Renton v. Playtime Theatres*, 475 U.S. 41, 45–49, 106 S.Ct. 925, 928–29, 89 L.Ed.2d 29, *reh'g denied*, 475 U.S. 1132, 106 S.Ct. 1663, 90 L.Ed.2d 205 (1986)). "Content-based" suppression of speech is impermissible because government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views. *Renton*, 106 S.Ct. at 929 (quoting *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95–96, 92 S.Ct. 2286, 2290, 33 L.Ed.2d 212 (1972)).

Defendants contend that the jury's inability to agree on defendants' purposes in using their franchising process means that the only appropriate course of action at this point is to schedule further trial limited to the issue of contentneutrality, citing *Iacurci v. Lummus Co.*, 387 U.S. 86, 87, 87 S.Ct. 1423, 1424, 18 L.Ed.2d 581 (1967) (per curiam), and 5A Moore's Federal Practice ¶ 49.03[4] at 49–29. These authorities stand for the proposition that a jury's failure to determine an issue actually submitted to it requires a new trial on the issue, because the right to a jury trial thereon has not been waived.

[8] The court agrees that it would be improper for the court to make an affirmative finding on whether defendants' policy does indeed discriminate against speech and speakers based on viewpoint.[9] However, a new trial is only necessary if the jury's determination on that issue would make a difference to the court's judgment. *See Union Pacific Railroad Co. v. Bridal Veil Lumber Co.*, 219 F.2d 825, 831–32 (9th

9. The court notes that plaintiff does indeed ask for such a finding in its post-trial brief and asks this court to subject defendants' policy to strict scrutiny. *See Consolidated Edison*, 447 U.S. at 540, 100 S.Ct. at 2334 (regulation must be a precisely drawn means of serving a compelling governmental interest).

Cir.1955) (jury's disagreement on "vital question" left "a gaping hole" in special verdict requiring a new trial), *cert. denied*, 350 U.S. 981, 76 S.Ct. 466, 100 L.Ed. 849 (1956). Even if the jury found in defendants' favor during the new trial, the court would find that defendants' policy does not survive the lesser scrutiny applied to viewpoint-neutral regulations. Because of this, no new trial is necessary.

Accordingly, the court will assume, for the purposes of analysis, that defendants' policy is viewpoint-neutral.[10] The appropriate framework for reviewing a viewpoint-neutral regulation is set forth in *O'Brien*, 391 U.S. at 377, 88 S.Ct. at 1679. Under *O'Brien*,

> [a] government regulation is sufficiently justified if it is within the constitutional power of government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged first amendment freedoms is no greater than is essential to the furtherance of that interest.

391 U.S. at 377, 88 S.Ct. at 1679; *see also Preferred*, 754 F.2d at 1405–06; 106 S.Ct. at 2037–38 (also referring to *O'Brien* test).

A regulation is "no greater than essential" under *O'Brien* if it promotes a substantial government interest which would be achieved less effectively absent the regulation. *United States v. Albertini*, 472 U.S. 675, 689, 105 S.Ct. 2897, 2907, 86 L.Ed. 2d 536 (1985). Regulations are not invalid exist. *See Pacific Gas and Electric v. Public Utilities Commission of California*, 475 U.S. 1, 19, 106 S.Ct. 903, 913, 89 L.Ed.2d 1 (discussing the definition of a "narrowly tailored" means), *reh'g denied*, 475 U.S. 1133, 106 S.Ct. 1667, 90 L.Ed.2d 208 (1986); *see also Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 298 n. 8, 104 S.Ct. 3065, 3071–72 n. 8, 82 L.Ed.2d 221 (1984) (*O'Brien* requires an "adequate nexus between regulation and interest sought to be served"); *Preferred*, 754 F.2d at 1406 (requiring a "more sharply focused response").

[9, 10] The court notes in passing that defendants' policy cannot be justified as a content-neutral "time, place and manner" regulation. Time, place and manner restrictions are acceptable so long as they are designed to serve a substantial government interest and do not unreasonably limit alternative avenues of communication. *City of Renton*, 106 S.Ct. at 928 (citing *Clark*, 468 U.S. at 293, 104 S.Ct. at 3069, *Vincent*, 466 U.S. at 807, 104 S.Ct. at 2130, and *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 647, 101 S.Ct. 2559, 2564, 69 L.Ed.2d 298 (1981)). In this case, the jury found that defendants had not left open ample alternative channels of communication for plaintiff, and persons like plaintiff, who wish to express their views. *See also Preferred*, 754 F.2d at 1410 (public access channels not an adequate substitute for right to operate a cable system). Defendants' single franchise policy results in plaintiff's cable tele-

3. Analysis

a. Constitutional Power of Government to Regulate Cable Television

[11] The authority of local government to authorize the construction and operation of cable systems within its jurisdiction is recognized under both state and federal law. Section 53066 of the California Government Code provides, in pertinent part:

> Any city or county or city and county in the State of California may, pursuant to such provisions as may be prescribed by its governing body, authorize by franchise or license the construction of a community antenna television system. In connection therewith, the governing body may prescribe such rules and regulations as it deems advisable to protect the individual subscribers to the services of such community antenna television system. The award of the franchise or license may be made on the basis of quality of service, rates to the subscriber, income to the city, county or city and county, experience and financial responsibility of the applicant plus any other consideration that will safeguard the local public interest, rather than a cash auction bid.... Any cable television franchise or license awarded by a city or county or city and county pursuant to this section may authorize the grantee thereof to place wires, conduits and appurtenances for the community antenna television system along or across such public streets, highways, alleys, public properties, or public easements of said city or county or city and county. Public easements, as used in this section, shall include but shall not be limited to any easement created by dedication to the city or county or city and county for public utility purposes or any other purpose whatsoever.

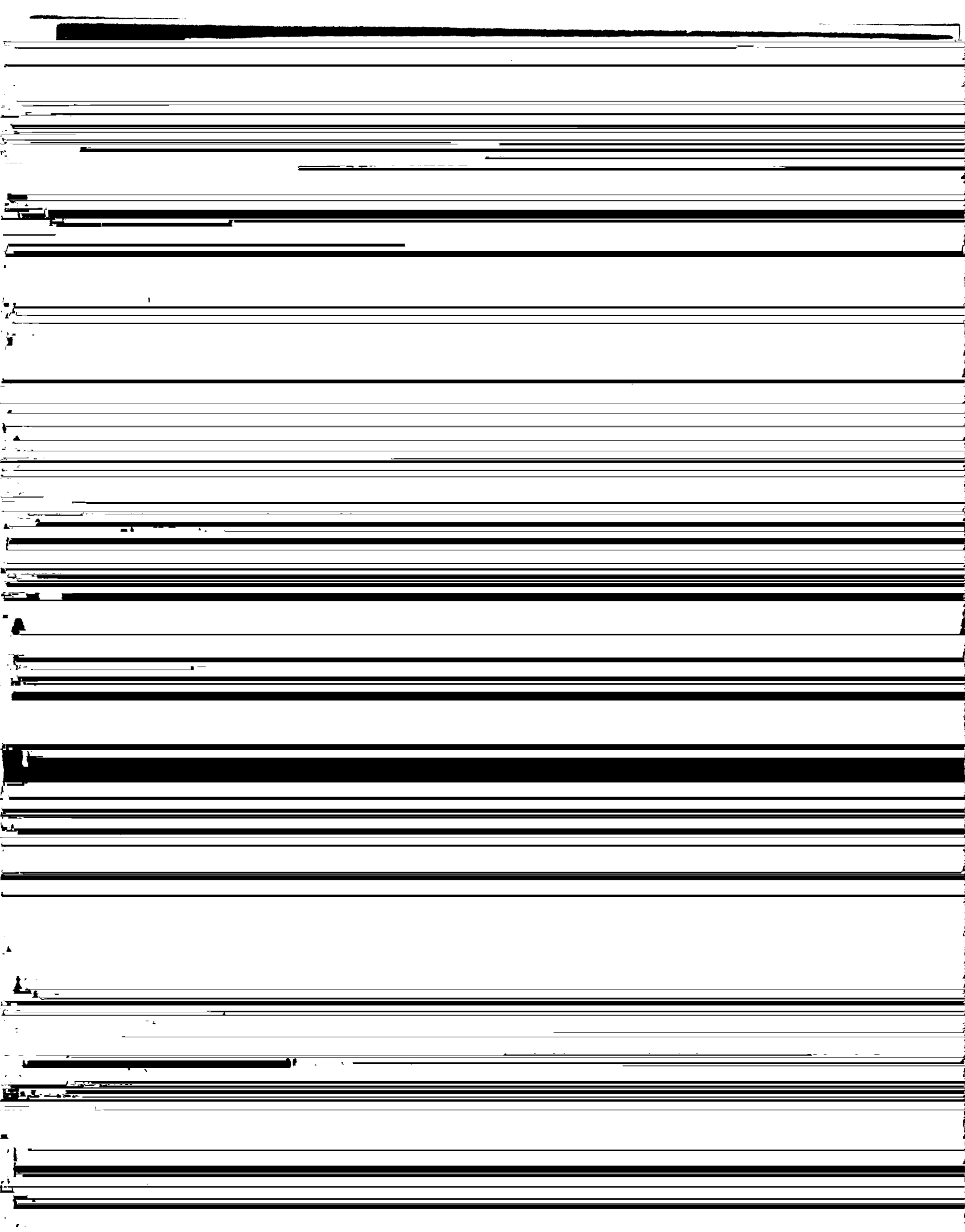
The court disagrees with plaintiff's contention that section 767.5 of the California Public Utilities Code supersedes this provision in the Government Code and somehow "preempts" local regulation of cable television. Section 767.5(b) provides:

> The Legislature finds and declares that public utilities have dedicated a portion of such support structures to cable television corporations for pole attachments in that public utilities have made available, through a course of conduct covering many years, surplus space and excess capacity on and in their support structures for use by cable television corporations for pole attachments, and that the provision by such public utilities of surplus space and excess capacity for such pole attachments is a public utility service delivered by public utilities to cable television corporations.
>
> The Legislature further finds and declares that it is in the interest of the people of California for public utilities to continue to make available such surplus space and excess capacity for use by cable television corporations.

The court interprets this section as imposing upon public utilities a mandatory duty to make "surplus space" on utility poles and in utility easements available for use by cable television operators. The section in no way addresses or diminishes the authority of local governments to regulate access to that space.

The Cable Communications Policy Act of 1984, 47 U.S.C. § 521 *et seq.*, and the legislative history accompanying it, also recognizes the authority of local governments to authorize construction of cable systems over public rights of way and utility easements. *See* 47 U.S.C. § 541(a) (a franchising authority may award one or more franchises; franchises authorize construction of cable systems over public rights of way and utility easements). Although the 1984 Act was not in effect at the time defendants enacted the cable television ordinance, the franchising provisions of the Act were declarative of existing law and practice.

Cir.1981), *cert. dismissed*, 456 U.S. 1001, 102 S.Ct. 2287, 73 L.Ed.2d 1296 (1982); *Omega Satellite Products Co. v. City of Indianapolis*, 694 F.2d 119, 127–28 (7th Cir.1982); *Berkshire Cablevision of Rhode Island v. Burke*, 571 F.Supp. 976, 984 (D.R.I.1983), *vacated as moot*, 773 F.2d 382 (1st Cir.1985). The court notes, however, that the jury rejected all of the justifications for defendants' policy based on the disruptiveness of installing cable television systems.



able service at reasonable rates ... [This] may be the inevitable destination to which all routes converge.

694 F.2d at 126; [12] *see also Affiliated Capital Corp. v. City of Houston*, 700 F.2d 226, 234 (5th Cir.) ("If there is to be no competition within a given territory, competition is only possible before the franchise is granted."), *vacated on other grounds*, 714 F.2d 25 (1983), *and adhered to*, 735 F.2d 1555 (5th Cir.1984) (en banc).

If the jury had determined that cable television in the Sacramento area was indeed a natural monopoly and that competition would have "inevitably" resulted in a single firm controlling the market, then the impact of a single franchise policy on first amendment freedoms would have been much less.[13] If, because of the cost structure of a cable television system, a monopoly is inevitable, it does not significantly reduce the overall diversity of expression if

c. Government's Interest in Financial and Technical Qualifications of Cable Operators

The government's interest in the technical and financial qualifications of cable television system operators is reflected in various sections of the 1984 Cable Act. *See* 47 U.S.C. § 544 (regulation of services, facilities and equipment), § 552 (consumer protection); it is also reflected in the Act's legislative history:

> This grant of authority to a franchising authority to award a franchise establishes the basis for state and local regulation of cable systems. Other sections of the bill establish certain terms by which such authority may be exercised. In addition, matters subject to state and local authority include, to the extent not addressed in the legislation, certain terms and conditions related to the grant of a franchise

fications of cable television system operators, it also found that defendants' policy did not promote their interest in having a technically well-qualified cable television system operator. Furthermore, the jury also found that plaintiff has the technical and financial capabilities to construct and operate a cable television system, which suggests that defendants' single franchise policy goes further than necessary in excluding would-be cable television system operators from the market. In fact, there was no showing or argument that a single franchise policy is the only, or even the most effective, way to assure that only technically and financially sound cable television systems are built.[14] Thus while these constitute significant government interests, the restriction on speech caused by defendants' policy is significantly greater than necessary to promote these interests.

d. Government's Interest in Uniform Cable Service

The substantiality of the government's interest in assuring uniform cable television service is also reflected in the fact that the 1984 Cable Act mandates such service. Section 621(a)(3) of the Act provides:

> In awarding a franchise or franchises, a franchising authority shall assure that access to cable services is not denied to any group of potential residential cable subscribers because of the income of the residents of the local area in which such group resides.

47 U.S.C. § 541(a)(3). In adopting this provision, Congress explained:

> Subsection (a)(3) provides that in awarding the franchise, the financing authority shall assure that no class of potential residential cable subscribers is denied cable service due to income or economic status. In other words, cable systems will not be permitted to "redline" (the practice of denying income areas). Under franchising authority process shall require t areas of the franchise a type of practice. How not prohibit a franchisin issuing different franch geographic areas withi

House Report, at 59, 1984 & Admin.News at 4696.

However, Congress' in uniform service has bee controversy. Initially, the nications Commission ("F ed this section as meanin chising authority shall re eas of the franchised area tice of Proposed Rulemak at 48,769 (emphasis added) ly retreated from this po

> [T]he intent of [section prevent the exclusion based on income and does not mandate that authority require the co the franchise area in tho where such an exclusion the income status of the unwired area.

Report and Order, 50 Fed The District of Columbia upheld F.C.C.'s most recen reasoning that

> [t]he statute on its face p ination on the basis of festly does not require u The agency ruling exp the prohibition against sized by the House rep argues that the commi dences congressional in practical matter one can redlining by wiring "all a chise." Otherwise "an e 'facially neutral' excuses

14. The court notes that defendants' new licensing ordinances set minimum technical and financial standards for cable television operators. Sacramento County, Cal., Code ch. 5.75 (hereinafter cited as "County Ordinance"), sub-chapter 3 (System Capability and Standards), sub-chapter 4 (Construction Requirements) and sub-chapter 7 (Bonds and Insuran Sacramento City, Cal., Code after cited as "City Ordinanc (System Capability and Stand 4 (Construction Requirement 7 (Bonds and Insurance).

by cable operators to deny cable service to 'unprofitable' parts of a community." Brief for ACLU at 25. We hold that this one sentence from the committee report cannot reasonably be read to so drastically limit the agency's interpretation of the scope of its discretion in accomplishing the legislative goal. *See, e.g., FCC v. WNCN Listeners Guild*, 450 U.S. 582, 598 [101 S.Ct. 1266, 1276, 67 L.Ed.2d 521] (1981) ("The legislative history of the Act ... provides insufficient basis for invalidating the agency's construction of the Act."); *cf. supra* II.A.1 at 36–39. Rather, we read the sentence to require exactly what it says: "wiring of all areas of the franchise" *to prevent redlining*. However, if no redlining is in evidence, it is likewise clear that wiring within the franchise area can be limited. This is precisely the statement made in the interpretative ruling. It wholly conforms to the statute and the explication in the House report. We therefore uphold the comment as fully consistent with clear congressional intent.

ACLU v. F.C.C., 823 F.2d 1554 (D.C.Cir. 1987).

Of course, defendants are free to go further than Congress requires, and again, defendants adopted the policy challenged in this suit prior to the effective date of the 1984 Cable Act. In fact, of all of the interests identified by the jury, the court believes that defendants' interests in assuring uniform service and preventing redlining is the most substantial, inasmuch as it promotes the "widest possible dissemination of information." *See Associated Press*, 326 U.S. at 20, 65 S.Ct. at 1425.[15] Yet as important as the government's interest is in equal and uniform service, it is not sufficiently substantial to justify a government-created, artificial monopoly over a particular medium of communication, particularly when it is not clear that such a monopoly is essential to achieving such uniform service.

e. Government's Interest in Public Access Channels, Etc.

Public access to cablecasting is another interest which Congress saw fit to cover in the 1984 Cable Act, although the Act's provisions are permissive only. 47 U.S.C. § 531.[16] Of all the interests identified by

15. The court acknowledges, however, that such a requirement may be challenged as representing "forced speech." *See Pacific Gas and Electric*, 106 S.Ct. at 909 (first amendment protections include right not to speak).

16. The Act's access provisions read:

Section 531. Cable channels for public, educational, or governmental use.

(a) Authority to establish requirements with respect to designation or use of channel capacity

A franchising authority may establish requirements in a franchise with respect to the designation or use of channel capacity for public, educational, or governmental use only to the extent provided in this section.

(b) Authority to require designation for public, educational, or governmental use

A franchising authority may in its request for proposals require as part of a franchise, and may require as part of a cable operator's proposal for a franchise renewal, subject to section 546 of this title, that channel capacity be designated for public, educational, or governmental use, and channel capacity on institutional networks be designated for educational or governmental use, and may require rules and procedures for the use of the channel capacity designated pursuant to this section.

(c) Enforcement authority

A franchising authority may enforce any requirement in any franchise regarding the providing or use of such channel capacity. Such enforcement authority includes the authority to enforce any provisions of the franchise for services, facilities, or equipment proposed by the cable operator which relate to public, educational, or governmental use of channel capacity, whether or not required by the franchising authority pursuant to subsection (b) of this section.

(d) Promulgation of rules and procedures

In the case of any franchise under which channel capacity is designated under subsection (b) of this section, the franchising authority shall prescribe—

(1) rules and procedures under which the cable operator is permitted to use such channel capacity for the provision of other services if such channel capacity is not being used for the purposes designated, and

(2) rules and procedures under which such permitted use shall cease.

(e) Editorial control by cable operator

Subject to section 544(d) of this title, a cable operator shall not exercise any editorial control over any public, educational, or governmental use of channel capacity provided pursuant to this section....

the jury, public access is the most controversial.

For example, public access requirements may have their own constitutional infirmities. The Supreme Court has explicitly refused to rule on the first amendment permissibility of public access requirements, except to note that the claims of unconstitutionality are not frivolous. *See Midwest Video Corp. v. F.C.C.*, 440 U.S. 689, 709 n. 19, 99 S.Ct. 1435, 1446 n. 19, 59 L.Ed.2d 692 (1979). Congress was careful to note this when it included a public, educational and governmental (PEG) access provision in the 1984 Cable Act:

> H.R. 4103 includes several provisions, specifically those related to PEG and commercial access, which may require that certain channels or portions of channels on a cable system be available for programming and controlled by a person other than the cable operator. The committee is aware that access provisions have been challenged in the court as inconsistent with the First Amendment rights of the cable operator. The Committee believes, nonetheless that the access provisions contained in this legislation are consistent with and further the goals of the First Amendment. The provision [sic] establish a form of content-neutral structural regulation which will foster the availability of a "diversity of viewpoints" to the listening audience. In the past, courts have held a similar regulation to be consistent with the First Amendment.

H.R.Rep. No. 98-934, 98th Cong.2d Sess. at 31, *reprinted in* 1984 U.S.Code Cong. & Admin.News 4655, 4668. Two district courts have held that access requirements are constitutional. *Erie Telecommunications, Inc. v. City of Erie*, 659 F.Supp. 580, 598-601 (W.D.Pa.1987); *Berkshire Cablevision*, 571 F.Supp. at 987; *but see Midwest Video Corp. v. F.C.C.*, 571 F.2d 1025, 1053-57 (8th Cir.1978), *aff'd on other grounds*, 440 U.S. 689, 99 S.Ct. 1435, 59 L.Ed.2d 692 (1979). In each of the cases in which the access requirement was found constitutional, the court nonetheless acknowledged that access infringed upon the rights of the franchisee. *Erie*, 659 F.2d at 599; *Berkshire*, 571 F.Supp. at 987.

Moreover, some of the jury's verdicts in this case indicate that defendants' interests were not "unrelated to the suppression of expression," as required under the *O'Brien* test. The jury found that defendants were motivated to secure public access channels and in kind services by a desire to obtain political support and favor political supporters. The jury also found that defendants used cable television's allegedly naturally monopolistic nature as a pretext to obtain cash payments, in kind services and increased campaign contributions. This suggests that defendants sought to enhance the speech of some while burdening the expression of others—a result which is contrary to the first amendment values. *See Pacific Gas and Electric*, 106 S.Ct. at 914 (citing *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 785-86, 98 S.Ct. 1407, 1420-21, 55 L.Ed.2d 707, *reh'g denied*, 436 U.S. 907, 98 S.Ct. 3126, 57 L.Ed.2d 1150 (1978), and *Buckley v. Valeo*, 424 U.S. 1, 48-49, 96 S.Ct. 612, 648-49, 46 L.Ed.2d 659 (1976)).

While these motivations do not rise to the level of a "predominant purpose" to suppress speech, *see Walnut Properties*, 808 F.2d at 1334-35, they nonetheless affect the analysis of whether the defendants' interest in providing public access is sufficiently substantial to justify the impact on expression caused by a single franchise policy. As with the potential constitutional questions surrounding public access, the fact that defendants may have had less than noble motivations in promoting public access diminishes the substantiality of the government's interest in such access and increases the resulting impact on expression.

Finally, even if public access requirements are constitutional, the court is again not persuaded that a single franchise policy is the only effective way to secure such access. The court recognizes that the prospect of a monopoly is more likely to motivate a cable television system operator to accept public access requirements. *See Century Federal*, 648 F.Supp. at 1476 (of-

fer of exclusive franchise can be used as a "plum" to bargain for certain concessions, *e.g.*, access channels, which may not be obtainable under a competitive system). However, there was no showing that such channels would be uneconomic in a competitive system, particularly if access requirements are uniformly imposed on all cable television system operators.[17]

4. Conclusion

To summarize, defendants bear the burden of proving that the elements of the *O'Brien* test are satisfied. 754 F.2d at 1406, n. 9. The jury's determination that cable television is not a natural monopoly means that the impact of a government-cre-

ing defendants from interfering with the rights established in favor of plaintiff under the requested declaratory relief judgment; (3) special and general damages occasioned by defendants' alleged wrongful acts; (4) attorneys' fees and costs pursuant to statute.

[14] Inasmuch as this case is not moot, a declaratory judgment establishing that defendants' single franchising policy violates plaintiff's first amendment rights is appropriate. With respect to its request for injunctive relief, plaintiff indicated at the post-trial hearing that it is seeking two kinds of relief:

1. An order directing defendants to

Irrespective of whether plaintiff did or did not present its claims in this respect to the jury, injunctive relief is not appropriate.

[16] However, the court finds that injunctive relief is appropriate with respect to plaintiff's request for permission to build and operate its cable television system. The nature of the relief sought is such that plaintiff has no adequate remedy at law and will suffer irreparable harm if equitable relief is denied.

As already indicated, the issue of damages was submitted to the jury. It found that no damages should be awarded. The court notes that plaintiff objected to defendants' proposed instruction on nominal

JUDGMENT

Pursuant to the special verdicts of the jury and the determinations and conclusions of law signed and filed by the court on August ____, 1987 (entitled "Memorandum Decision, Conclusions of Law and Order for Judgment"), and good cause appearing,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. That the formulation and implementation of defendants' cable television franchising process, to the extent to which the issuance of a franchise or license to construct and operate a cable television system in the Sacramento area

pending (1) a final determination as to its validity or invalidity by a court of competent jurisdiction or (2) further order of this court;

b. No performance, compliance or adherence of plaintiff to any term or condition of such chapters pursuant to this injunction shall constitute a waiver, estoppel or bar of any type against plaintiff in connection with its judicial challenge, if any, to that term or condition;

c. If at the time of the issuance of licenses pursuant to this injunction plaintiff shall not have theretofore complied with the requirements of any particular provisions of the specified chapters, then subsequent compliance within a reasonable time period, and in any event prior to the commencement of construction, shall be deemed to satisfy such provisions.

In the event that defendants, or either of them, should amend and/or modify the terms and/or conditions of the specified chapters, such amendments and/or modifications shall not become effective as against plaintiff unless and until this injunction shall have been modified to include such amended and/or modified terms and/or conditions.

Nothing contained in this injunction shall be construed to prevent enforcement against plaintiff of the terms and conditions of the specified code chapters or of any code, ordinance or statute not inconsistent with the contents hereof without the further approval and/or review of this court.

Nothing contained in this injunction or in the specified chapters shall be construed to prevent the application by plaintiff and/or defendants to this court for further review of the terms and conditions hereof as appropriate.

3. That plaintiff be awarded nothing by way of money damages against either or both defendants;

4. That any applications for award of statutory costs and/or attorneys' fees shall be served, filed and processed in accordance with the provisions of Rules 292 and 293 of Local Rules for the Eastern District of California."

APPENDIX A

SPECIAL VERDICT NO. 1
(Not Given)

a. DID DEFENDANTS DENY PLAINTIFF'S REQUEST FOR PERMISSION TO CONSTRUCT AND OPERATE A CABLE TELEVISION SYSTEM IN THE SACRAMENTO METROPOLITAN AREA?

YES _____ NO _____

SPECIAL VERDICT NO. 2

a. WAS THE PREDOMINANT PURPOSE UNDERLYING DEFENDANTS' USE OF THE RFP (REQUEST FOR PROPOSAL) PROCESS TO LIMIT THE ABILITY OF CABLE OPERATORS TO EXPRESS THEIR VIEWS AND EXERCISE THEIR EDITORIAL JUDGMENT?

YES _____ NO _____ NOT ANSWERED X

b. DID DEFENDANTS DENY PLAINTIFF PERMISSION TO CONSTRUCT AND OPERATE A CABLE TELEVISION SYSTEM BECAUSE DEFENDANTS OPPOSE PLAINTIFF'S VIEWS?

YES _____ NO _____ NOT ANSWERED X

APPENDIX A—Continued

c. WAS THE PREDOMINANT PURPOSE UNDERLYING DEFENDANTS' USE AND APPLICATION OF THE RFP PROCESS TO DISCOURAGE EXPRESSION OF ONE VIEWPOINT AND ADVANCE EXPRESSION OF ANOTHER?

YES _____ NO _____ NOT ANSWERED X

d. DOES THE RFP PROCESS APPLY EVENHANDEDLY (I.E. REGARDLESS OF VIEWPOINT) TO ALL ENTITIES DESIRING TO PROVIDE CABLE TELEVISION SERVICE?

YES _____ NO _____ NOT ANSWERED X

SPECIAL VERDICT NO. 3

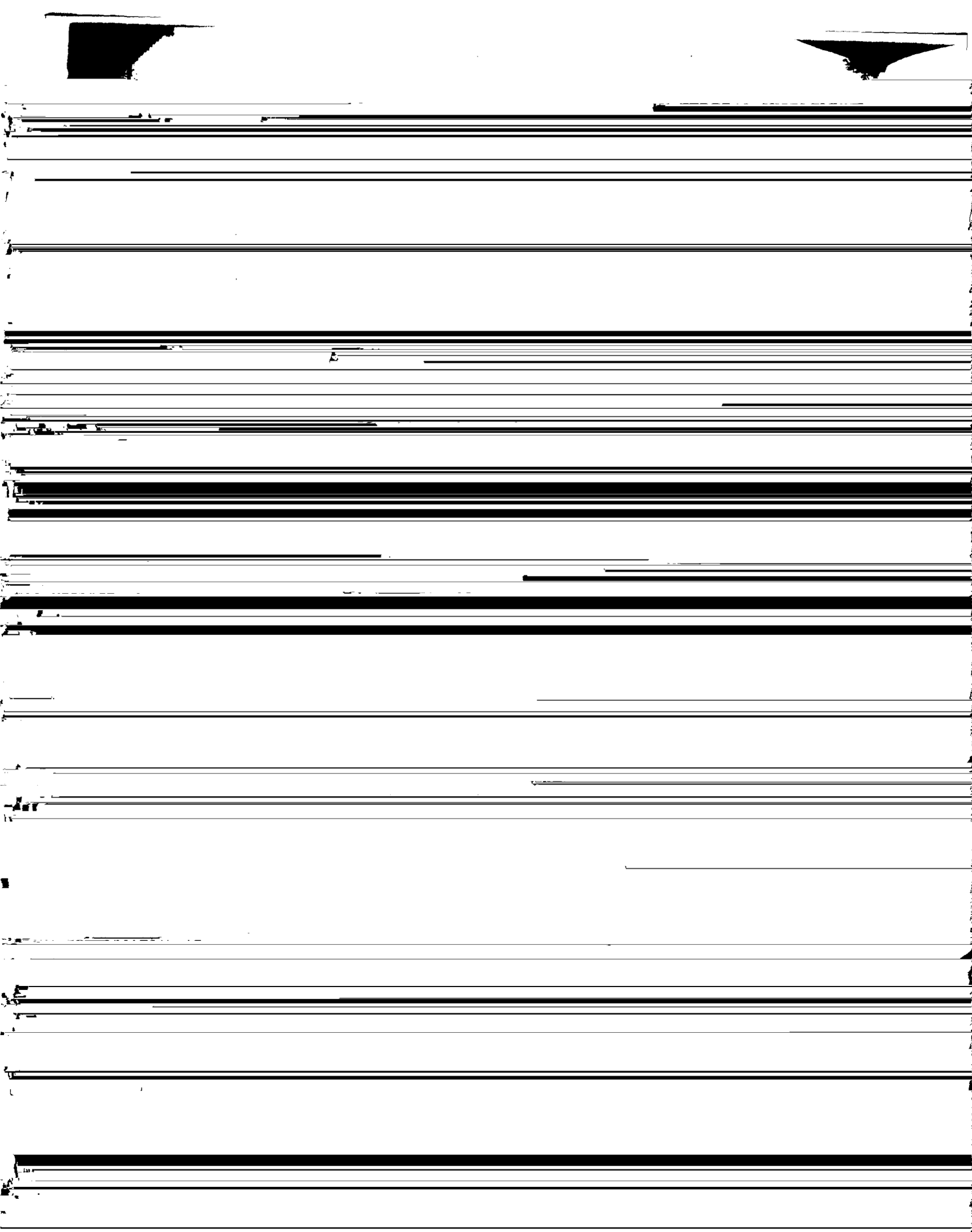
a. HAVE DEFENDANTS LEFT OPEN AMPLE ALTERNATIVE CHANNELS OF COMMUNICATION FOR PLAINTIFF, AND PERSONS LIKE PLAINTIFF, WHO WISH TO EXPRESS THEIR VIEWS?

YES _____ NO X

SPECIAL VERDICT NO. 4

a. DID PLAINTIFF HAVE THE FINANCIAL AND TECHNICAL CAPABILITIES TO CONSTRUCT AND OPERATE A CABLE TELEVISION SYSTEM IN THE SACRAMENTO METROPOLITAN AREA?

YES X NO _____



APPENDIX A—Continued

SPECIAL VERDICT NO. 7

a. DOES THE CONSTRUCTION AND OPERATION OF A CABLE TELEVISION SYSTEM CAUSE SIGNIFICANT DISRUPTION IN THE USE OF PUBLIC PROPERTY?

YES _____ NO X

b. IF YOUR ANSWER TO THE PRECEDING QUESTION IS "YES," DID DEFENDANTS' USE OF THE RFP PROCESS RESULT IN LESS DISRUPTION THAN WOULD OCCUR WITHOUT THE RFP PROCESS?

YES _____ NO _____

c. WAS "DISRUPTION AND INCONVENIENCE" A SHAM USED BY DEFENDANTS AS A PRETEXT FOR JUSTIFYING THEIR RFP PROCESS?

YES _____ NO X

SPECIAL VERDICT NO. 8

a. DOES THE CONSTRUCTION AND OPERATION OF A CABLE TELEVISION SYSTEM CAUSE SIGNIFICANT SAFETY HAZARDS TO BOTH THE PUBLIC AND WORKERS?

YES _____ NO X

APPENDIX A—Continued

b. IF YOUR ANSWER TO THE PRECEDING QUESTION IS "YES," DID DEFENDANTS' USE OF THE RFP PROCESS RESULT IN FEWER SAFETY HAZARDS THAN WOULD OCCUR WITHOUT THE USE OF THE RFP PROCESS?

YES _____ NO _____

c. [illegible] SAFETY HAZARDS A CLAIM USED BY DEFENDANTS AS

APPENDIX A—Continued

c. WAS "INTERFERENCE WITH ABILITY TO USE PRIVATE PROPERTY" A SHAM USED BY DEFENDANTS AS A PRETEXT FOR JUSTIFYING THEIR RFP PROCESS?

YES _____ NO X

SPECIAL VERDICT NO. 10

a. DOES THE CONSTRUCTION AND OPERATION OF A CABLE TELEVISION SYSTEM CAUSE ANY OF THE FOLLOWING TO A SIGNIFICANT DEGREE: NOISE, VISUAL CLUTTER, ENVIRONMENTAL AND/OR AESTHETIC PROBLEMS?

YES _____ NO X

b. IF YOUR ANSWER TO THE PREVIOUS QUESTION IS "YES," DID DEFENDANTS' USE OF THE RFP PROCESS RESULT IN FEWER OF THESE IMPACTS THAN WOULD OCCUR WITHOUT THE USE OF THE RFP PROCESS?

YES _____ NO _____

APPENDIX A—Continued

c. WAS "NOISE, VISUAL CLUTTER, AND/OR OTHER ENVIRONMENTAL AND AESTHETIC IMPACTS" A SHAM USED BY DEFENDANTS AS A PRETEXT FOR JUSTIFYING THEIR RFP PROCESS?

YES _____ NO X

SPECIAL VERDICT NO. 11
(Not Given)

a. DOES THE CONSTRUCTION AND OPERATION OF A CABLE TELEVISION SYSTEM CREATE SIGNIFICANT ADMINISTRATIVE OR REGULATORY BURDENS FOR GOVERNMENT? (BURDENS ARE "SIGNIFICANT" IF THEY ARE GREATER THAN THOSE WHICH WOULD OCCUR USING THE ENCROACHMENT PERMIT PROCESS.)

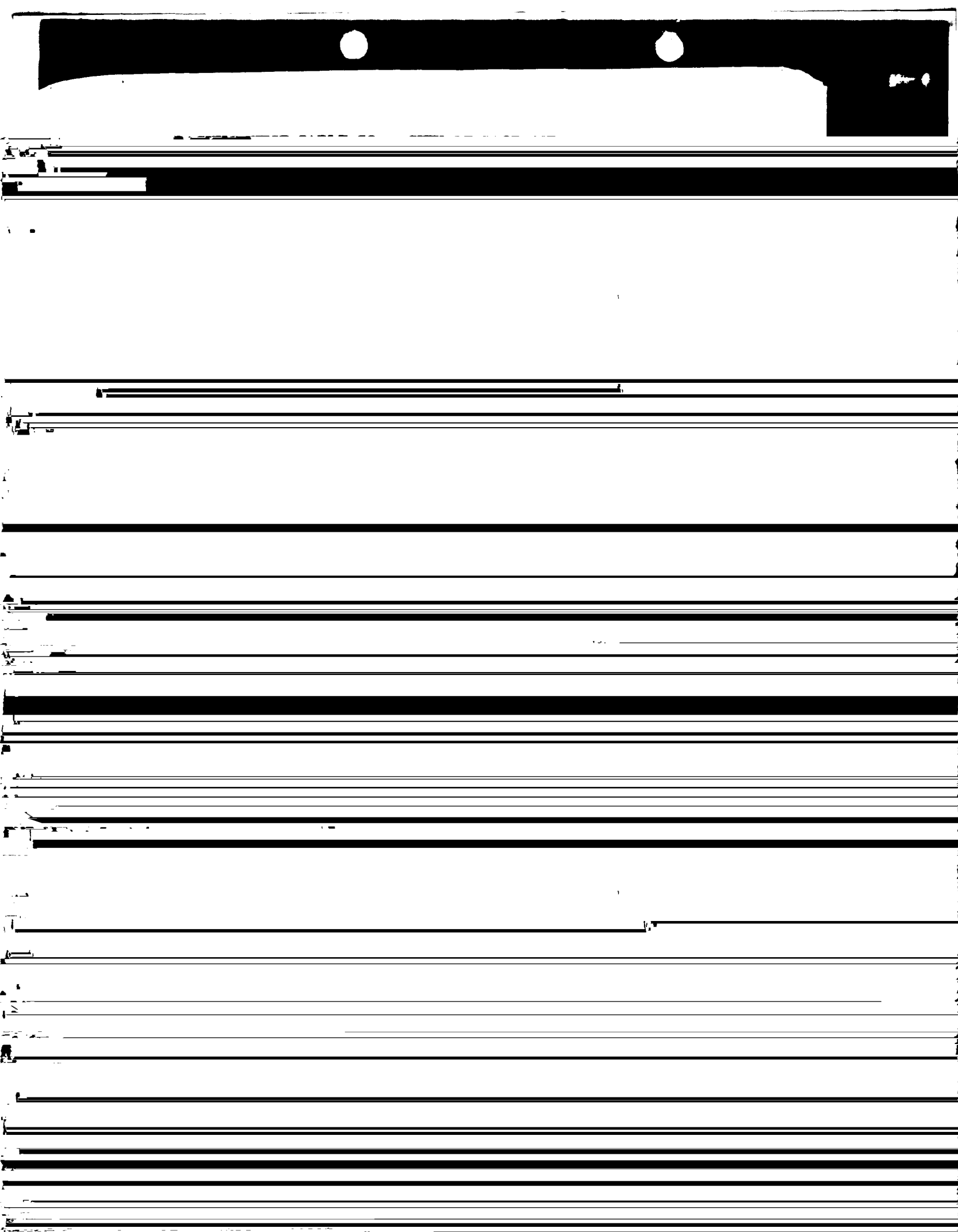
YES _____ NO _____

b. IF YOUR ANSWER TO THE PRECEDING QUESTION IS "YES," DID DEFENDANTS' USE OF THE RFP PROCESS PROVIDE A MORE EFFECTIVE MEANS OF MINIMIZING THE BURDENS THAN THE ENCROACHMENT PERMIT PROCESS?

YES _____ NO _____

c. WAS "ADMINISTRATIVE AND REGULATORY BURDENS" A SHAM USED BY DEFENDANTS AS A PRETEXT FOR JUSTIFYING THEIR RFP PROCESS?

YES _____ NO _____



APPENDIX A—Continued

d. WAS "NATURAL MONOPOLY" A SHAM USED BY DEFENDANTS TO PROMOTE THE MAKING OF CASH PAYMENTS AND PROVISION OF "IN KIND" SERVICES BY THE COMPANY ULTIMATELY SELECTED TO PROVIDE CABLE TELEVISION SERVICE TO THE SACRAMENTO MARKET?

YES X NO ____

e. WAS "NATURAL MONOPOLY" A SHAM USED BY DEFENDANTS TO OBTAIN INCREASED CAMPAIGN CONTRIBUTIONS FOR LOCAL ELECTED OFFICIALS?

YES X NO ____

SPECIAL VERDICT NO. 13

a. DOES THE PUBLIC AS A WHOLE BENEFIT FROM EQUAL AND UNIFORM CABLE TELEVISION SERVICE THROUGHOUT THE SACRAMENTO COMMUNITY?

YES X NO ____

APPENDIX A—Continued

b. DID THE RFP PROCESS ENCOURAGE EQUAL AND UNIFORM CABLE TELEVISION SERVICE TO A GREATER DEGREE THAN WOULD BE ACHIEVED IN THE ABSENCE OF THE RFP PROCESS?

YES X NO ____

c. WAS "EQUAL AND UNIFORM CABLE TELEVISION SERVICE" A SHAM USED BY DEFENDANTS AS A PRETEXT FOR JUSTIFYING THEIR RFP PROCESS?

YES ____ NO X

SPECIAL VERDICT NO. 14

1. DOES THE PUBLIC AS A WHOLE OBTAIN SIGNIFICANT BENEFITS FROM ANY OF THE FOLLOWING: ACCESS CHANNELS, PRODUCTION FACILITIES, TECHNICAL ASSISTANCE AND GRANTS?

YES X NO ____

APPENDIX A—Continued

b. DID THE RFP PROCESS ENCOURAGE THE PROVISION OF THESE KINDS OF RESOURCES TO A GREATER EXTENT THAN WOULD BE PROVIDED IN THE ABSENCE OF THE RFP PROCESS?

YES X NO _____

c. IF YOUR ANSWER TO THE PRECEDING QUESTION IS "YES," WERE DEFENDANTS MOTIVATED TO PROVIDE SUCH BENEFITS BY EITHER A DESIRE TO OBTAIN INCREASED POLITICAL INFLUENCE FOR ELECTED OR APPOINTED LOCAL OFFICIALS OR A DESIRE TO FAVOR LOCAL OFFICIALS' POLITICAL SUPPORTERS?

YES X NO _____

d. WAS THE PROVISION OF SUCH BENEFITS A SHAM USED BY DEFENDANTS AS A PRETEXT FOR JUSTIFYING THEIR RFP PROCESS?

YES _____ NO X

APPENDIX A—Continued

SPECIAL VERDICT NO. 15

a. DOES THE RFP PROCESS RESULT IN "BETTER" CABLE TELEVISION SERVICE, IN TERMS OF THE SYSTEM'S TECHNOLOGY, CAPABILITIES AND CHANNEL CAPACITY, THAN WOULD BE ACHIEVED WITHOUT THE RFP PROCESS?

YES _____ NO X

b. WAS "SYSTEM TECHNOLOGY, CAPABILITY AND CHANNEL CAPACITY" A SHAM USED BY DEFENDANTS AS A PRETEXT FOR JUSTIFYING THEIR RFP PROCESS?

YES _____ NO _____ NOT ANSWERED X

SPECIAL VERDICT NO. 16

a. DOES THE PUBLIC HAVE A SIGNIFICANT INTEREST IN THE FINANCIAL QUALIFICATIONS OR BACKGROUND OF ANY COMPANY CONSTRUCTING AND OPERATING A CABLE SYSTEM IN SACRAMENTO? (THE PUBLIC'S INTEREST IS SIGNIFICANT IF, AMONG OTHER THINGS, CONSUMERS WOULD RECEIVE REDUCED LEVELS OF CABLE SERVICES AND TECHNOLOGY IF GOVERNMENT DID NOT INQUIRE INTO THE FINANCIAL CAPABILITIES OF CABLE OPERATORS.)

YES X NO _____